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Counsel for Plaintiff EyeWonder, Inc.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

EYEWONDER, INC.,

Plaintiff,

v.

JOHN ABRAHAM,

Defendant.

)
)
)
) 08 CV 3579 (GBD)
)
)
) **PLAINTIFF EYEWONDER INC.'S**
) **MOTION TO DISMISS**
) **DEFENDANT'S COUNTERCLAIMS**
)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

EYEWONDER, INC.,)
Plaintiff,)
)
v.) 08 CV 3579 (GBD)
)
)
JOHN ABRAHAM,) PLAINTIFF EYEWONDER, INC.'S
) MOTION TO DISMISS
Defendant.) DEFENDANT'S COUNTERCLAIMS
)

Pursuant to the Federal Arbitration Act, 9 U.S.C. § 4, and Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Plaintiff EyeWonder, Inc. ("EyeWonder") hereby moves to dismiss Defendant John Abraham's Counterclaims, due to lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, in that the claims are subject to compulsory arbitration. In support of this Motion, EyeWonder is also filing a supporting Memorandum of Law, and states as follows:

1. Mr. Abraham formerly was employed by EyeWonder under the terms of an Employment Agreement between the parties (the "Agreement"). After learning that Mr. Abraham had accepted employment with one of its direct competitors, EyeWonder commenced an arbitration proceeding, as required under Section 8 of the Agreement, to enforce certain provisions of the Agreement. EyeWonder also asked Mr. Abraham to agree to comply with the terms of the Agreement pending resolution of their disputes in the arbitration proceeding. Mr. Abraham, however, refused this request.

2. The complaint filed by EyeWonder in this case is styled as a "Verified Complaint for Injunctive Relief in Aid of Arbitration." Although Paragraph 8(a) of the Agreement broadly

requires that "[a]ny controversy or claim arising out of or relating to this Agreement" shall be subject to binding arbitration, a limited exception is provided for the sole purpose of allowing a party to seek interim injunctive relief in a court of law to preserve the status quo until the parties' dispute can be resolved in arbitration. *See* Verified Compl. Exh. A ¶ 8(a), (c).

3. Pursuant to this limited exception, EyeWonder sought relief in this Court for the sole purpose of requesting that Mr. Abraham be enjoined from soliciting, on behalf of his new employer, EyeWonder employees and certain EyeWonder customers pending the outcome of the arbitration proceeding. On June 9, 2008, this Court preliminarily enjoined Mr. Abraham from soliciting EyeWonder's employees and 42 specifically-identified EyeWonder customers pending the outcome of the arbitration proceeding.

4. On June 20, 2008, Mr. Abraham filed his Amended Answer and Counterclaims in this action. The Counterclaims, however, have been asserted by Mr. Abraham in violation of the Agreement's mandatory arbitration provisions. The Counterclaims include claims for fraud, intentional interference with prospective business advantage, unfair competition, and rescission of contract based on fraud. Mr. Abraham also seeks a declaration that the Agreement is unconscionable and legally unenforceable. *Id.* ¶¶ 90, 113.

5. These Counterclaims do not satisfy the Agreement's exception to compulsory arbitration that permits a party to file suit solely for the purpose of seeking interim injunctive relief to preserve the status quo. As noted above, the Agreement provides that "[a]ny controversy or claim arising out of or relating to this Agreement" be resolved in binding arbitration; this includes tort and contract claims, as well as claims of any other nature. Accordingly, Mr. Abraham's tort claims, as well as his claims that the Agreement is void and unenforceable due to fraud and unconscionability, are questions that must be submitted to the

arbitrator in the first instance. *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-446 (2006); *Bar-Ayal v. Time Warner Cable Inc.*, 2006 WL 2990032, *6 (S.D.N.Y. Oct. 16, 2006).

6. Because it is clear that all of Mr. Abraham's Counterclaims are subject to binding arbitration under Paragraph 8(a) of the Agreement, this Court lacks subject matter jurisdiction over them. For the same reason, Mr. Abraham's Counterclaims fail to state claims upon which relief can be granted, because this Court is not in a position to grant any relief on those claims.

7. Accordingly, these Counterclaims should be dismissed, without prejudice to Mr. Abraham's bringing such claims in the pending arbitration proceeding.

WHEREFORE, Plaintiff EyeWonder, Inc. prays the Court as follows:

1. For an Order dismissing Mr. Abraham's Counterclaims without prejudice to his prosecuting such claims in the pending arbitration proceeding; and
2. For such other and further relief as this Court deems just and proper.

Respectfully submitted this 10th day of July, 2008.

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CERTIFICATE OF SERVICE

This is to certify that, on July 10, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to:

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